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The "P" Isn't for Privacy: The Conflict Between Bankruptcy Rules and HIPAA Compliance

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Abstract

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) included a now-ubiquitous provision designed to protect the privacy of patients' protected health information. The provision prohibits covered entities, including health care providers and their agents, from disclosing any demographic information that may identify a patient and that relates to that patient's medical care. The provision is broad and can include such simple information as which doctor a patient consults or the date of a patient's consultation with a physician.

Unfortunately, such protections become impracticable in the bankruptcy setting. When a health care provider files bankruptcy, it files a host of documents that may inadvertently disclose protected health information. For example, recent patients usually must be given the opportunity to file a claim. To do so, the provider must list them on its initial schedules filed with its petition. These schedules, like almost all bankruptcy filings, become public record and can be found online, resulting

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in the type of disclosure prohibited by HIPAA. And the problem compounds as the case continues.

By walking through the hypothetical Chapter 11 case of a bankrupt fertility clinic, this Note highlights a few of the bankruptcy disclosures that prove particularly risky to protected health information (PHI). It argues that the rigidity of the Federal Rules of Bankruptcy Procedure and Title 11 of the United States Code (the Bankruptcy Code) contravene HIPAA's privacy rule. It then recommends several opportunities to protect PHI through attorney, court, and legislative action. Specifically, this Note proposes that Congress incorporate specific language aimed at protecting PHI into existing bankruptcy laws. Enacting even a few of the recommendations in this Note would facilitate the protection of PHI and HIPAA compliance.

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INTRODUCTION

Jane and John Doe have wanted a child for several years,[1] but, like nearly 15 percent of United States adults, they struggle with infertility.[2] And, like many couples in the United States, their infertility has led to shame and stress.[3] Luckily, the Does sought treatment from their local fertility clinic (the Clinic) and are now expecting their first child.[4] The Does also know that their privacy is protected by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[5]

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1. Jane and John Doe are fictional characters intended to tell the typical narrative of a couple's experience with a fertility clinic. Because this Note will focus almost exclusively on the fertility clinic, it will draw upon publications from the American Pregnancy Association, the Mayo Clinic, Planned Parenthood, and the University of Rochester Medical School to construct a realistic narrative regarding couples undergoing fertility treatments. But the fertility clinic is simply one example of the variety of health care providers implicated in this Note, and the arguments presented here are in no way limited to fertility patients and providers.

2. *See Female Infertility*, HHS.GOV, https://perma.cc/QJ9W-DQH5 (last updated Feb. 21, 2019) ("Infertility is common. Out of 100 couples in the United States, about 12 to 13 of them have trouble becoming pregnant."); *see also* Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR. (July 17, 2018), https://perma.cc/8W3F-TQ45 ("33% of American adults report that they or someone they know has used some type of fertility treatment in order to have a baby.").

3. *See* Linda M. Whiteford & Lois Gonzalez, *Stigma: The Hidden Burden of Infertility*, 40 SOC. SCI. MED. 27, 28 (1995) ("For many infertile women in North America infertility is a secret stigma, distinguished from more obvious examples of stigmatization because it is invisible.").

4. *See In Vitro Fertilization*, MAYO CLINIC (June 22, 2019), https://perma.cc/J4P9-XB62 ("In vitro fertilization (IVF) is a complex series of procedures used to help with fertility or prevent genetic problems and assist with the conception of a child.").

5. Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 18, 26, 29, and 42 U.S.C.); *see The HIPAA Privacy Rule*, HHS.GOV, https://

Shortly after Jane's treatment, the Clinic declared bankruptcy. This phenomenon is not uncommon, as the health care industry currently faces severe economic distress.[6] While total Chapter 11 filings have steadily decreased since 2010, Chapter 11 filings in the health care sector have steadily increased.[7] At least thirty hospitals filed bankruptcy in 2019 alone.[8] Moreover, most of that financial distress is concentrated in rural areas,[9] but can impact both large and small health care

perma.cc/JGN3-XPX3 ("The HIPAA Privacy Rule establishes national standards to protect individuals' medical records and other personal health information.").

6. *See Polsinelli—TrBK Distress Indices, 4th Quarter 2019 Analysis* (2020), DISTRESSINDEX.COM, https://perma.cc/JC2K-QUWU ("For the fourth quarter of 2019, the Health Care Services Distress Research Index reached 225.00. The index has exceeded the benchmark by at least 100% the last 11 quarters."). The Polsinelli TrBK Distress Indices measure the level of distress in various sectors of the United States economy by tracking the increase or decrease in comparative Chapter 11 filings. *See id.* ("Health care services filings have increased from 1.13% in 2010 to 5.06% this quarter."); *see also* David A. Samole, *Hospital Impact—A Guide to a Healthcare Provider Bankruptcy Case* (Jul. 13, 2017), FIERCE HEALTHCARE, https://perma.cc/7Z23-B2Z2 ("[D]ue in part to the current uncertainty in the healthcare industry and its legislative oversight, more financially distressed providers are considering Chapter 11 bankruptcy.").

7. *See* Paige Minemyer, *Report: Hospital Bankruptcies Skyrocketed in Past 2 Years*, FIERCE HEALTHCARE (Nov. 1, 2018, 9:15 PM), https://perma.cc/GWR4-XTL2 ("Chapter 11 filings have decreased by 53% nationwide since 2010 . . . . But in healthcare, its distress scores increased by 305% in that same window."). These numbers are expected to increase even more because of COVID-19, which has created short-term financial challenges—loss of staff, decline in insured patients due to job loss, disrupted supply chains, increased PPE costs, and cancellation of non-emergent procedures—that will become long-term financial challenges. *See Hospitals and Health Systems Face Unprecedented Financial Pressures Due to COVID-19* (May 2020), https://perma.cc/7PCQ-QZFT (estimating that American hospitals suffered $202.6 billion in losses in the four months between March 1, 2020 and June 30, 2020).

8. *See* Lauren Coleman-Lochner & Jeremy Hill, *Hospital Bankruptcies Leave Sick and Injured Nowhere to Go*, BLOOMBERG L. NEWS (Jan. 9, 2020, 7:00 AM), https://perma.cc/85BP-75J3 ("They range from Hahnemann University Hospital in downtown Philadelphia to De Queen Medical Center in rural Sevier County, Arkansas and Americore Health LLC, a company built on preserving rural hospitals.").

9. *See* Minemyer, *supra* note 7 ("About 3 out of 4 of hospitals that filed bankruptcy [in 2018] were in rural areas.").

providers.[10] When a health care provider files bankruptcy, it risks the privacy promised by HIPAA.[11] Because bankruptcy requires the debtor to disclose immense quantities of organizational documents, Jane's health information could become public record.[12]

This Note examines the failure of bankruptcy rules to protect patient privacy and comply with HIPAA when a health care provider files Chapter 11 bankruptcy. It begins in Part I with an overview of the bankruptcy process, a background on Chapter 11 cases, and a discussion of HIPAA, as they relate to Jane and John Doe.[13] Part II analyzes the privacy concerns that arise when a health care provider files bankruptcy and applies those concerns to the Does.[14] For instance, almost all bankruptcy documents are matters of public record.[15] Thus, if the Clinic's financial documents include Jane or John's information, their names and potentially the services they purchased will likely be published online.[16] Specifically, Part II.A discusses the dangers of electronic filing, which all United States Bankruptcy Courts encourage.[17] Part II.B then describes the conflicts between the United States Bankruptcy Code ("the Code") and the HIPAA privacy rule.[18] Part II.C details many of

10. *See* Ayla Ellison, *22 Hospital Bankruptcies in 2019*, BECKER'S HOSP. CFO REP. (Jan. 26, 2020), https://perma.cc/364C-38Y7 (describing the bankruptcy filing of Americore Health and its four affiliated hospitals across the country as well as the filing of Springfield Medical Care Systems, which consisted of a 25-bed hospital and nine community health centers).

11. *See infra* Part II.C.

12. *See infra* Part II.B.

13. *See infra* Part I.

14. *See infra* Part II.

15. *See* 11 U.S.C. § 107 (designating all bankruptcy filings as public record). Exceptions include: trade secrets, confidential research, development, or commercial information, or scandalous or defamatory matter. *See id.* § 107(b) (providing that "[o]n request of a party in interest, the bankruptcy court shall . . . protect an entity [or person]" if they fall within certain categories).

16. *See infra* Part II.A. As Part II.C will discuss, the Chapter 11 bankruptcy process is replete with opportunities to breach the Does' privacy.

17. *Local Court CM/ECF Information Links*, PACER, https://perma.cc/A4TN-2U58.

18. HIPAA includes numerous provisions that do not regard patient privacy. Those that do are commonly referred to collectively as the HIPAA

the opportunities for HIPAA privacy violations that arise throughout a Chapter 11 case. Finally, Part III proposes solutions to these concerns, such as counsel-implemented precautions, court interventions, and potential legislative opportunities.[19]

I. BACKGROUND

A. *The Life of a Chapter 11 Case*

The United States Bankruptcy Code establishes six basic types of bankruptcy cases, each named for the chapter that describes it.[20] This Note exclusively discusses Chapter 11 cases involving entity debtors. Under Chapter 11, commercial enterprises undergo a court-approved reorganization to continue operating their business while repaying creditors.[21] The privacy issues presented in this Note may also exist in other types of bankruptcy cases, but they are most prevalent in Chapter 11.[22]

Privacy Rule. *See The HIPAA Privacy Rule*, HHS.GOV, https://perma.cc/B2R8-D92V (last updated Apr. 16, 2015) ("The Privacy Rule is located at 45 CFR Part 160 and Subparts A and E of Part 164.").

19. *See infra* Part III.

20. In Chapter 7 Liquidation cases, a United States Trustee takes over the assets of the debtor's estate, reduces them to cash, and makes distributions to creditors. Chapter 9 provides for the reorganization of a municipality. Chapter 12 provides exclusively for the adjustment of debts of a family farmer or fisherman with regular income. Chapter 13 provides debt relief and reorganization for individuals with a regular source of income. *See* ADMIN. OFF. OF U.S. CTS., BANKRUPTCY BASICS 6 (Nov. 2011), https://perma.cc/LA7F-ZAJW (PDF) [hereinafter BANKRUPTCY BASICS] (detailing the types and processes of bankruptcy cases).

21. Individuals may also file a bankruptcy petition under Chapter 11, but it is more commonly used by corporations and partnerships. *Id.* ("Chapter 11, entitled Reorganization, ordinarily is used by commercial enterprises that desire to continue operating a business and repay creditors concurrently through a court-approved plan of reorganization.").

22. For one, companies in bankruptcy tend to prefer filing under Chapter 11 rather than Chapter 7, because the former allows the business to continue operating. *See* MARGARET HOWARD & LOIS R. LUPICA, BANKRUPTCY CASES AND MATERIALS 20 (6th ed. 2016) ("The possibility that current management may retain control of a corporation may make Chapter 11 more attractive than Chapter 7."). Additionally, Chapter 7 does not create as many concerns about patient privacy as Chapter 11 does, because the existing statutory framework

1. Bankruptcy Players

All bankruptcy cases involve common players. In Chapter 11 entity cases, the debtor is the business entity that petitions for bankruptcy.[23] The debtor has a variety of duties, mostly involving filing documents with the court, attending meetings and hearings, and cooperating with the other interested parties.[24] The businesses or individuals to whom the debtor owes money are creditors.[25]

In some cases, the court may appoint a Chapter 11 trustee to oversee the administration of the case. At any time between the petition filing and the plan confirmation, the United States Trustee or a party in interest may request the appointment of a Chapter 11 trustee for cause.[26] Generally, the moving party can show just cause if the debtor is clearly incapable of effectively managing its own affairs.[27] Otherwise, the court may appoint a Chapter 11 trustee when it is in the best interests of the creditors, equity security holders,[28] or other interests of the

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for liquidation accounts for moving patients from one facility to another and the destruction of patient records. *See infra* Part III.C.3.

23. Counsel for the debtor-in-possession has a fiduciary duty to the post-bankruptcy entity, and not to any individual controlling or managing the entity. *Justice Manual: The Bankruptcy "Players" – Outline*, U.S. DEP'T OF JUST. (Jan. 17, 1996), https://perma.cc/4UJQ-2WFE (citing *In re* Bellevue Place Assocs., 171 B.R. 615 (Bankr. N.D. Ill. 1994)); *see generally In re* Sidco, Inc., 173 B.R. 194 (E.D. Cal. 1994) (providing a comprehensive discussion of the meaning of "adverse interest"); 11 U.S.C. § 327 (prohibiting an attorney from simultaneously representing a creditor and a trustee as a general counsel).

24. *See* 11 U.S.C. § 521 (listing a non-exclusive list of duties that debtors have in a bankruptcy case, such as filing a statement of financial affairs); FED. R. BANKR. P. 4002 (listing debtors' duties "in addition to performing other duties prescribed by the Code").

25. *See* 11 U.S.C. § 101(10) ("The term 'creditor' means . . . entity that has a claim against the debtor."); *id.* § 101(5) ("The term 'claim' means . . . right to payment.").

26. *See id.* § 1104(a) (allowing appointment of a Chapter 11 trustee "if such appointment is in the interests of creditors").

27. *Id.*

28. *See id.* § 101(16)–(17) ("The term 'equity security' means . . . share in a corporation, . . . interest of a limited partner in a limited partnership; . . . warrant or right . . . to purchase, sell, or subscribe to a share."). The main differences between creditors and equity security holders

debtor's estate.[29] As Part II will discuss, if the court appoints a Chapter 11 trustee, that person is perfectly situated to inadvertently receive protected health information from the debtor.[30]

Nevertheless, the debtor's existing management is entitled to deference, and case law makes clear that the appointment of a Chapter 11 trustee is rare.[31] Instead, the debtor typically assumes the role of debtor-in-possession.[32] In this role, the debtor, as an organization hoping to remain in operation, retains most of the control of the business and the case administration.[33] The debtor-in-possession, therefore, carries most of the power in a Chapter 11 case.[34]

Yet the judge has ultimate authority over the case and is responsible for resolving disputes.[35] Bankruptcy judges,

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are formative rather than functional and bear no effect on the analysis in this Note. *See* BANKRUPTCY BASICS, *supra* note 20, at 38 ("Generally, most of the provisions that apply to proofs of claim . . . also apply to proofs of interest.").

29. *See* 11 U.S.C. § 1104 ("[T]he court shall order the appointment of a trustee . . . if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate . . . .").

30. *See id.* § 1106 (describing the duties of a Chapter 11 trustee as identical to those of a debtor-in-possession).

31. *See In re* Marvel Ent. Grp., Inc., 140 F.3d 463, 471 (3d Cir. 1998) ("Thus, the basis for the strong presumption against appointing an outside trustee is that there is often no need for one."); *In re* Sharon Steel Corp., 871 F.2d 1217, 1225 (3d Cir. 1989) ("It is settled that appointment of a trustee should be the exception, rather than the rule."); *In re* Spansion, Inc., 426 B.R. 114, 128 (Bankr. D. Del. 2010) ("[A]ppointment of a chapter 11 trustee is an extraordinary remedy.").

32. *See* 11 U.S.C. § 1101 ("'[D]ebtor in possession' means debtor except when a person . . . is serving as a [Chapter 11] trustee in the case.").

33. *See id.* § 1107 ("[A] debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee.").

34. *See* S. REP. NO. 95-989 ("[Section 1107] places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee.").

35. *See* 11 U.S.C. § 105 ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

however, are not Article III judges.[36] The bankruptcy court is an "adjunct" of the district court and has the authority to hear and decide all "core proceedings arising under title 11, or arising in a case under title 11."[37] Cases are typically "referred" to the bankruptcy court by the district court.[38] Thus, a bankruptcy judge might not be the only judge involved with a case, because any particular matter could end up in district court.[39]

Bankruptcy cases, however, do not spend much time in court, and judges have limited contact with the parties.[40] Typically, the judge participates in the case only to make final decisions on bankruptcy petitions, motions, and hearings.[41] Practitioners have compared them to umpires and phantoms,[42] because bankruptcy judges intervene only when a disagreement arises.[43] When the Chapter 7 debtor moves to discharge his debts, for example, the judge's signature is automatic unless another party challenges the motion.[44]

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36. *See* U.S. CONST. art. II, § 8, cl. 4 (vesting the power of creating bankruptcy laws in Congress).

37. 28 U.S.C. § 157(b)(1).

38. *See* HOWARD & LUPICA, *supra* note 22, at 20 ("Bankruptcy courts originated as an administrative branch of district courts, governed by 'referees.'").

39. *See* 28 U.S.C. § 1334(a) ("[T]he district courts shall have original and exclusive jurisdiction of all cases under title 11."); *The Bankruptcy "Players" —Outline*, U.S. CTS., https://perma.cc/S5XH-NVX8 (last updated Nov. 1998) ("Cases are 'referred' to the bankruptcy court by the district court through standing orders of referral.").

40. *Process-Bankruptcy Basics*, U.S. CTS., https://perma.cc/A7SK-FQHM ("Much of the bankruptcy process is administrative, however, and is conducted away from the courthouse.").

41. *See Role of Bankruptcy Judges*, LAWS, https://perma.cc/S4H3-QMVY (last updated Dec. 23, 2019) ("While trustees will generally be doing most of the legwork when it comes to the negotiation between debtors and creditors[,] . . . bankruptcy judges will still need to sign off on motions and petitions made at various points in the application process.").

42. *See* Cathy Moran, *Bankruptcy Judge: The Phantom in Your Case*, MORAN L. GRP., https://perma.cc/W2T3-SDU3 ("Think of the bankruptcy judge as an umpire. He enforces the rules of the game and decides disputes.").

43. *Id.*

44. *Id.*

The United States Trustee is situated similarly as the case overseer.[45] The United States Trustee monitors the progress of bankruptcy cases and the conduct of the parties to ensure compliance with applicable laws and procedures.[46] Congress designed the United States Trustee program to alleviate the administrative burden on judges.[47] They have broad statutory standing in Chapter 11 cases, but, as an arm of the Department of Justice, they are rarely deeply involved in Chapter 11 cases.[48]

2. Chapter 11 Procedure

Every Chapter 11 case takes a unique path, which prevents generalizing what activities or tasks will be completed or in what order they occur.[49] Most Chapter 11 cases, however, involve variations on a few interrelated groups of tasks, including claims administration, avoidance, and confirmation.[50] Claims administration in particular may frequently implicate patient privacy.[51] The debtor must file countless schedules of information, including personal and financial information about real and potential creditors.[52] When the debtor is a health care

45. *See* 11 U.S.C. § 323 ("The trustee in a case under this title is the representative of the estate.").

46. *See In re* Gideon, Inc., 158 B.R. 528, 530 (Bankr. S.D. Fla. 1993) ("[T]he UST may also act as an administrative arm of the bankruptcy . . . such as appointing or removing trustees, requiring reports, scheduling meetings of creditors, etc. In these instances, the UST no longer acts as a party litigant but as an official authority.").

47. *See In re* South Beach Sec., 606 F.3d 366, 371 (7th Cir. 2010) (describing the United States Trustee as the "guardian of the public interest" in bankruptcy cases).

48. For instance, the United States Trustee has the right to raise any issue and to be heard on any issue raised by others. 11 U.S.C. § 307.

49. *See* Michael Bernstein & Jonathan Friedland, *The Life Cycle of a Chapter 11 Debtor Through the Debtor's Eyes, Part II*, AM. BANKR. INST. J. 2003, at 1 ("It is impossible to generalize what activities and events will occur in any particular chapter 11 case because each case is so different.").

50. *See id.* ("There is no such rule that prescribes the order in which such tasks must be completed. Rather, when, or even if, these activities will take place in any given case will depend on a multitude of factors.").

51. *See infra* Part II.C.

52. *See* Bernstein & Friedland, *supra* note 49, at 1 ("If you are going to pay claims, you have to make sure you know whom to pay. If you are going to put claims into different classes, you have to know who goes in which class.").

provider, some of these creditors may be current or former patients.[53]

When an entity files a voluntary petition under Chapter 11, the filer must adhere to the format of Form B 201 of the Judicial Conference of the United States, on which Jane Doe's Clinic would designate itself as a health care business.[54] The debtor must also file schedules of assets and liabilities; a schedule of current income and expenditures; a schedule of executory contracts and unexpired leases; and a statement of financial affairs (SOFA).[55] These filings include standard information about the debtor as well as lists of creditors and outstanding debts.[56] Eventually, a party to the case—either the debtor or a creditor—must file a reorganization plan,[57] which includes a

53. *See infra* Part II.C.

54. *See* U.S. BANKR. CT., INSTRUCTIONS FOR BANKRUPTCY FORMS FOR NON-INDIVIDUALS 4 (2019), https://perma.cc/CHG7-6CQM (PDF) ("The debtor must file the forms listed below on the date the debtor files its bankruptcy case.").

55. *See* FED. R. BANKR. P. 1007(b) ("[T]he debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed by the appropriate Official Forms, if any."). The process is largely the same when the provider is an involuntary debtor. *See* BANKRUPTCY BASICS, *supra* note 20, at 29 (describing the difference as simply who (the debtor or the creditor) files the bankruptcy petition). The distinction bears no impact on the analysis of this Note. For the sake of brevity and clarity, the hypothetical in this Note focuses on a voluntary debtor.

56. BANKRUPTCY BASICS, *supra* note 20, at 29.

57. *See* 11 U.S.C. § 1121 (granting authority to file a plan to any party in interest after allotting sufficient time for the debtor to first file his proposed plan). Only the debtor may file a reorganization plan within the first 120 days of the case. After that exclusionary period—which may be extended up to 18 months with court approval—another party may propose a plan. *See id.* § 1121(d)(2)(A) ("The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter."). Likewise, the debtor has an exclusive acceptance period for the first 180 days of the case, which may be extended up to 20 months, or reduced for cause. *Id.* § 1121(d)(2)(B). If the exclusive period expires before the debtor has filed and obtained acceptance of a plan, other parties in interest, such as a creditor or the creditors' committee, may file a competing plan. *See id.* § 1121(c) ("Any party in interest . . . may file a plan if and only if . . . the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief."). Additionally, the trustee must file either a plan, a report explaining why the trustee will not file a plan—such as if the debtor has filed a plan deemed appropriate by the trustee—or a recommendation for conversion or dismissal of the case. *Id.* § 1106(a)(5).

classification of claims and must specify how each class of claims will be treated under the plan.[58] Each of these filings contains enormous quantities of information regarding nearly every facet of the organization's operations.[59] Because the debtor expects to reorganize its debts and receive a discharge of debts it cannot pay, the government and court carefully scrutinize the debtor's operations to determine the best strategy for debt forgiveness.[60] The debtor files all of these details with the court.[61]

Among other duties, the United States Trustee appoints a creditors' committee.[62] This committee typically consists of unsecured creditors who hold the seven largest claims against the debtor.[63] For the policies noted above, the creditors' committee investigates the debtor's conduct and operation of the business and participates in formulating the reorganization plan.[64] Before the creditors accept the plan, its proponent must mail it to the United States Trustee and all creditors and equity security holders.[65] The debtor must also send the creditors

58. *See id.* § 1123 (listing mandatory and discretionary provisions of a Chapter 11 plan).

59. *See, e.g.*, FORM 206E/F, SCHEDULE E/F: CREDITORS WHO HAVE UNSECURED CLAIMS, https://perma.cc/MT35-MGDS (PDF) (requiring a list of all unsecured claims, creditors' names and contact information, and type, date, and amount of debts).

60. Mary Jo Obee & William C. Plouffe, Jr., *Privacy in the Federal Bankruptcy Courts*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1011, 1020 (2000) ("Clearly, the bankruptcy process is a very intrusive gatherer and disseminator of personal information.").

61. *See generally* FED. R. BANKR. P. 1007.

62. *See* 11 U.S.C. § 1102(a)(1) ("[T]he United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders.").

63. *See id.* § 1102(b)(1) ("A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee.").

64. *See id.* § 1103 ("A [creditors'] committee . . . may . . . investigate acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.").

65. *See* FED. R. BANKR. P. 3017(d) ("Upon approval of the disclosure statement, . . . the debtor in possession, trustee, proponent of the plan, or clerk . . . shall mail to all creditors and equity security holders, and in a

notice of the deadline to object to the proposed plan; notice of the date and time for the confirmation hearing of the plan; a ballot for accepting or rejecting the plan; and, if appropriate, a designation for the creditors to identify their preference among competing plans.[66] All of these notifications and mailings must be filed with the court.[67]

Upon acceptance of the plan by a specific majority of creditors,[68] the court may confirm the plan at a confirmation hearing.[69] Once the plan is confirmed by a court order, it is published on the Public Access to Court Electronic Records (PACER) database.[70] Thus, Chapter 11 proceedings require immense communication between and among the debtor, creditors, and sometimes third parties.[71] As Part II.A will discuss, each filing presents a new privacy risk to parties involved.[72]

B. *HIPAA Background*

In 1996, Congress enacted the Health Insurance Portability and Accountability Act to facilitate portability of health

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chapter 11 reorganization case shall transmit to the United State trustee, the plan or a court-approved summary of the plan . . . .").

66. *See* 11 U.S.C. § 1125(f) ("An acceptance or rejection of a plan may not be solicited . . . unless, at the time of or before such solicitation, there is transmitted to [each creditor] the plan or a summary of the plan, and a written disclosure statement.").

67. U.S. BANKR. CT., *supra* note 54, at 4.

68. An entire class of claims is deemed to accept a plan if the plan is accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims in the class. 11 U.S.C. § 1126(c).

69. *See id.* § 1129 (requiring confirmation of the plan only if certain requirements are met).

70. *See Public Access to Court Electronic Records*, PACER, https://perma.cc/8VAV-Y2YP ("PACER is provided by the Federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service.").

71. *See* 11 U.S.C. § 1103 ("At a schedule meeting of a committee appointed under section 1102 of this title, . . . such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.").

72. *See infra* Part II.A.

insurance coverage—a benefit felt most strongly by people with pre-existing conditions.[73] Subtitle F of the Act promulgates standards for efficiency and effectiveness of the health care system via electronic databases and filing systems.[74] Congress intended for Subtitle F to both improve efficiency and effectiveness of the health care system and protect individually identifiable health information.[75]

A health care provider that falls within the scope of Subtitle F—known as a "covered" provider—is permitted to use or disclose protected health information (PHI) only to the patient, and only for treatment, payment, or health care operations.[76] It also allows PHI disclosure to other parties with the patient's consent.[77] The Office of Civil Rights within the United States Department of Health and Human Services (OCR) defines "individually identifiable health information," or PHI, as demographic information created or received by a health care provider that may identify an individual and that relates to the past, present, or future physical or mental health or condition of that individual or the provision of health care to an individual.[78] This could include among other things a particular doctor that a patient sees, a condition that a patient has, or a service that a patient purchases.[79]

For instance, HIPAA prohibits a fertility clinic from divulging its patients' names, because one could reasonably infer from just the name of the patient and the name of the clinic what types of medical services that patient receives from the

73. *See* NICOLE HUBERFIELD ET AL., THE LAW OF AMERICAN HEALTH CARE 613 (2d ed. 2018) ("The major health care access achievement of the law was to facilitate the portability of health insurance coverage, meaning a person who had coverage would get credit for that coverage by the next insurer and could not be excluded on the basis of preexisting conditions.").

74. *See id.* at 614 ("In creating portability, Congress also decided to facilitate administrative efficiency through the electronic tools then available.").

75. *Id.* (citing the Office for Civil Rights of the Department of Health and Human Services, which is responsible for HIPAA interpretation, compliance, and enforcement).

76. 45 C.F.R. § 164.502(a)(1)(i)–(v) (2013).

77. *Id.*

78. 45 C.F.R. § 160.103 (2014).

79. *Id.*

clinic.[80] Divulging a patient's name both identifies the individual and relates to either that individual's past, present, or future health condition or the provision of health care to that individual.[81] Thus, the patient's name in connection with the clinic is PHI according to HIPAA.[82] The Does' Clinic, as a health care provider, is a "covered" entity under the Act, so HIPAA strictly prohibits the Clinic from divulging the Does' identities.[83]

Note that the language of the Act is broad but creates a few familiar exceptions. For instance, an individual can usually learn the medical condition of their hospitalized spouse.[84] Parents certainly have the right to know about their minor child's mental or physical well-being.[85] The public tends to take these rights for granted, even though they technically exist only as exceptions to the rule.[86] In other words, the patient has waived their right to absolute privacy in those instances, either consensually (by marriage) or by virtue of being a minor.[87] The breadth of this rule was particularly poignant before the Supreme Court ruled same-sex marriage bans unconstitutional.[88] Many of the arguments put forth in that debate focused on a same-sex couple's difficulty in sharing vital

80. *See supra* INTRODUCTION (discussing fertility clinic hypothetical).

81. *See* 45 C.F.R. § 160.103 (2014) (requiring both conditions for information to constitute PHI).

82. *See id.* (recognizing PHI as any identifying information).

83. *See id.* (defining "covered" entity broadly).

84. *See id.* § 164.510(b)(1)–(3) ("A covered entity may . . . disclose to a family member . . . the protected health information . . . if it . . . [r]easonably infers from the circumstance, based on the exercise of professional judgment, that the individual does not object to the disclosure.").

85. *Id.*

86. *See id.* (listing "[p]ermitted uses and disclosures").

87. *See id.* § 164.502(g)(3)(ii) (deferring to state law in the situation of a minor child and parent).

88. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015) ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

medical information.[89] Despite the exceptions, the broad rule still exists and is strictly enforced.[90]

In 2009, the Health Information Technology for Economic and Clinical Health (HITECH) Act strengthened the HIPAA privacy rules.[91] For one, the HITECH Act increased OCR's enforcement capability, deputizing state attorneys general to pursue privacy actions.[92] The Act allows a state attorney general to obtain damages on behalf of individuals or to enjoin further HIPAA privacy violations.[93] Unpermitted disclosures of and failure to protect PHI are two of the most common HIPAA violations.[94] Depending on the severity of the disclosure, HIPAA violators could be subject to as much as a $250,000 fine and up to ten years in prison.[95] Most importantly, disclosing PHI breaches patients' delicate privacy. The legislature intended HIPAA to be a sweeping set of privacy and security rules to which courts should defer.[96]

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89. *See id.* at 670 ("Yet by virtue of their exclusion from [marriage], same-sex couples are denied the constellation of benefits that the States have linked to marriage. . . . Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives."); Anisa Mohanty, Comment, *Medical Rights for Same-Sex Couples and Rainbow Families*, 13 RICH. J.L. & PUB. INT. 367, 367 (2010) ("With these widely disparate levels of [couple] recognition, it becomes difficult for same-sex couples to navigate their options and rights when a loved one . . . has a medical emergency or is in the hospital.").

90. *Enforcement Results as of December 31, 2019*, HHS.GOV, https://perma.cc/PG3V-VRUR (last updated Jan. 9, 2020).

91. HUBERFIELD ET AL., *supra* note 73, at 623–24.

92. *Id.*

93. *Id.*

94. *See The Most Common HIPAA Violations You Should Be Aware of*, HIPAA J. (Apr. 26, 2019), https://perma.cc/GBV3-9NXL ("The most common HIPAA violations that have resulted in financial penalties are . . . impermissible disclosures of PHI; delayed breach notifications; and the failure to safeguard PHI.").

95. *See* 45 C.F.R. § 160.404(b) (2016) ("For violations occurring on or after February 18, 2019, the Secretary may not impose a civil money penalty . . . less than $100 or more than $50,000 for each violation.").

96. *What is the Purpose of HIPAA?*, HIPAA J. (Oct. 18, 2017), https://perma.cc/MS2F-MUFX ("HIPAA is now best known for protecting the privacy of patients and ensuring patient data is appropriately secured, with those requirements added by the HIPAA Privacy Rule of 2000 and the HIPAA Security Rule of 2003.").

II. ANALYSIS OF PRIVACY CONCERNS

A. *The Dangers of E-Filing*

Electronic filing creates inherent privacy risks.[97] Although bankruptcy documents historically have been available to the public,[98] they were not always easily accessible.[99] Electronic court records make public access practical and easy.[100] Publication occurs via two digital platforms.[101] First, attorneys

97. *See generally* Susan M. Thurston, *New Privacy Rules Effective Dec. 1, 2003: From Conception to Implementation*, 22 AM. BANKR. INST. J. 36 (2003) (presenting an overview of the growth in usage of Case Management /Electronic Case Files (CM/ECF)). *See also* Peter C. Alexander & Kelly Jo Slone, *Thinking About the Private Matters in Public Documents: Bankruptcy Privacy in an Electronic Age*, 75 AM. BANKR. L.J. 437, 442–44 (2001) (discussing privacy concerns with electronic bankruptcy form filing); Luis Salazar, *Privacy and Bankruptcy Law*, 26 AM. BANKR. INST. J. 44, 44 (2007) (addressing the increased privacy concerns of a bankruptcy case as electronic case management and document filing becomes more prevalent); Richard A. Beckmann, *Privacy Policies and Empty Promises: Closing the "Toysmart Loophole"*, 62 U. PITT. L. REV. 765, 765 (2001) ("Bankruptcy is the most recent battleground in the struggle between consumers and businesses over control of personal information."); Timothy B. McGrath, *Privacy Rights and Pacer: Keeping Your Clients' Privacy Secure*, 29 AM. BANKR. INST. J. 36, 36 (2010) (analyzing the importance of "striking the appropriate balance between the public's right to unfettered access to accurate and timely court documents while preserving a litigant's right to guard his or her personal information from unwarranted intrusion and abuse").

98. *See* 11 U.S.C. § 107 ("[A] paper filed in a case under this title and the dockets of a bankruptcy court are public record and open to examination by an entity at reasonable times without charge.").

99. *See* Kate Marquess, *Open Court?*, 87 A.B.A. J. 54, 55 (2001) ("Until electronic access, they were available only on paper at the courthouse where they were filed. Traditionally, the court clerk has served as a gatekeeper, sometimes granting requests for documents, at other times declining to do so. But the procedure provided a shield to the personal information.").

100. *See* Alexander & Slone, *supra* note 97, at 439 ("With electronic filing and electronic public access to the court's information, . . . [on]e *is* able to rummage through the bankruptcy clerk's files electronically and can do so right from home.").

101. *See* ADMIN. OFF. OF U.S. CTS., PACER USER MANUAL FOR CM/ECF COURTS 11 (2019), https://perma.cc/V488-XZBD (PDF) ("The Case Management/Electronic Case Filing (CM/ECF) allows courts to accept electronically filed documents and provides access to filed documents online. The Federal Judiciary has developed a next generation (NextGen) CM/ECF

in most federal courts[102] file documents on the Case Management/Electronic Case Files (CM/ECF) system.[103] CM/ECF allows attorneys to file twenty-four hours a day, seven days a week.[104] These documents immediately become available to the general public on the PACER system.[105] PACER gives registered users twenty-four-hour access to case file documents, the ability to download and print court documents remotely, and simultaneous access to case files by multiple parties.[106] The database includes filings from current and recently closed federal cases.[107] PACER account registration costs nothing, although user fees fund the program.[108] Users must pay ten cents per page for PACER searches, but if a user accrues less than fifteen dollars of charges in a quarter, PACER waives their fees for that period.[109] Thus, anybody can search for, retrieve, download, and print any filing in any open bankruptcy case, subject to the fee-per-page.[110]

Court filings often contain deeply personal identifying information,[111] which raises privacy concerns.[112] The notion of privacy encompasses an individual's right to avoid "disclosure of

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system functionality that allows you to use the same account for both PACER and electronic filing access.").

102. Two hundred U.S. federal courts have implemented the CM/ECF system, including all ninety-two bankruptcy courts. *Local Court CM/ECF Information Links*, PACER, https://perma.cc/A4TN-2U58.

103. *See Frequently Asked Questions*, PACER, https://perma.cc/R4MN-EJBF (describing the electronic filing process).

104. *Id.*

105. *See* ADMIN. OFF. OF U.S. CTS., PACER USER MANUAL FOR CM/ECF COURTS 3 (2019), https://perma.cc/H74P-Q9K4 (PDF).

106. *Id.*

107. *See id.* ("Public Access to Court Electronic Records (PACER) allows users to view, print, or download current and recently closed federal cases.").

108. *Id.*

109. *Id.*

110. *Id.*

111. *See supra* Part I.B (discussing required bankruptcy filings); *see also* Alexander & Slone, *supra* note 97, at 438 (illustrating hypothetical dangers of electronic filings in the context of public snoopers and Chapter 13 individual cases).

112. *See* Alexander & Slone, *supra* note 97, at 438 ("Privacy issues loom large as bankruptcy courts move to electronic case filing and data storage.").

personal matters" and control personal information.[113] Courts and scholars have repeatedly recognized that a right to privacy exists under the Constitution[114] and at common law.[115] Professor Prosser categorized four distinct types of privacy invasions in tort law, including (1) intrusion upon the plaintiff's seclusion or into his private affairs and (2) public disclosure of embarrassing private facts.[116] Either of these could describe sensitive medical information. Still, bankruptcy rules require that "a paper filed in a case under [U.S.C. Title 11] and the docket of a bankruptcy court are public records and open to examination."[117] Public records inherently interest those concerned with the

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113. *See* Whalen v. Roe, 429 U.S. 589, 599 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters.").

114. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 270 (1990) ("Karen had a right of privacy grounded in the Federal Constitution to terminate treatment."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (discerning the roots of a right to privacy in the First Amendment); Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (extracting a right to privacy from the Fourth and Fifth Amendments); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (divining penumbras of privacy from the rights enumerated in the Bill of Rights); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing a right to privacy in the first section of the Fourteenth Amendment).

115. *See, e.g.*, Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905) ("The right of privacy has its foundations in the instincts of nature."); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890)

> The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.

RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977)

> [T]here is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth . . . . On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public and there is an invasion of privacy when it is made so.

116. *See* Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967) (citing WILLIAM PROSSER, LAW OF TORTS, § 117 (3d ed. 1964)). Prosser's formula took root in the RESTATEMENT (SECOND) OF TORTS § 652(A) (AM. L. INST. 1977).

117. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1330).

administration of justice.[118] This interest, however, conflicts with Jane Doe's interest in keeping her infertility private.[119]

B. *Conflict with the Health Insurance Portability and Accountability Act*

HIPAA prohibits disclosure of PHI.[120] Yet bankruptcy rules require the disclosure of PHI in numerous filings.[121] For example, Chapter 11 requires a health care provider to file a list of actual and potential creditors.[122] Imagine a scenario in which a medical provider— like Jane Doe's fertility Clinic[123]—declares bankruptcy under Chapter 11. When the Clinic files for bankruptcy, it might temporarily suspend its operations.[124] But fertility services often require advanced and out-of-pocket payments.[125] Any patient who had pre-paid for medical services not rendered will enter the Clinic's bankruptcy case as a creditor.[126]

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118. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records are naturally of interest to those concerned with the administration of government.").

119. *See supra* INTRODUCTION.

120. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 18, 26, 29, and 42 U.S.C.).

121. *See infra* Part. II.C.

122. *See* U.S. BANKR. CT., INSTRUCTIONS: BANKRUPTCY FORMS FOR INDIVIDUALS 19 (2019) ("When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.").

123. *See supra* INTRODUCTION.

124. This need not always be the case, but it sometimes is. *See, e.g.*, Jim Rutenberg & Bill Vlasic, *Chrysler Files to Seek Bankruptcy Protection*, N.Y. TIMES (Apr. 30, 2009), https://perma.cc/L87T-76UZ (discussing Chrysler's decision to cease production in most of its plants pending the completion of its Chapter 11 case).

125. *See State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGISLATURES (June 12, 2019), https://perma.cc/ZX8Q-NNFA ("16 states . . . have passed laws that require insurers to either cover or offer coverage for infertility diagnosis and treatment.").

126. *See* 11 U.S.C. § 101(10) (defining "creditor" as an entity that has a claim against the debtor).

The bankruptcy rules require the Clinic to disclose personal and financial information about its creditors, including former patients.[127] These documents become public record, accessible by virtually anyone.[128] Because the debtor must disclose its income sources, its organizational scheme, and the specific amounts owed to each creditor, even an amateur snooper could discern what service(s) the patient purchased. Thus, the filer has disclosed this patient's PHI to the court, the other parties to the case, and to the general public.

This scenario in which the debtor is a provider and the creditors are patients is less common than the reverse.[129] Indeed, medical providers almost always file creditor claims in Chapter 13 cases, where the debtors are often individuals with medical debt.[130] A Chapter 13 case involving a medical *creditor* does not pose the same privacy concerns associated with a Chapter 11 medical *debtor*.[131] If the debtor is a patient who owes money to a medical provider, as in the former scenario, he could simply choose whether to disclose his own PHI.[132] Moreover, the Bankruptcy Code includes methods for creditors to file claims for an individual's medical debt without disclosing the individual's PHI.[133] The situation examined by this Note,

127. *See supra* Part I.B.

128. Anyone willing to pay on PACER, that is. *See supra* Part II.A.

129. *See* Cecily A. Dumas & Allen Briskin, *Beware of Violating Patient Privacy Laws in Bankruptcy Claim Filings*, BLOOMBERG L. NEWS (Apr. 16, 2016, 4:42 PM), https://perma.cc/B9HA-P9Q6 ("The place where [PHI] is inadvertently disclosed by health-care providers most often is in filing claims for unpaid medical services.").

130. *See* 11 U.S.C. § 109(e) ("Only an individual with regular income . . . may be a debtor under chapter 13 of this title."); *see also* Dumas & Briskin, *supra* note 129 ("[T]wenty-six percent of surveyed debtors . . . filed for bankruptcy because of medical bills. . . . [S]ixty-one percent of all debtors in the study reported medical debt on Schedule F (schedule of unsecured claims).").

131. *See id.* (explaining procedures already in place for handling these situations). Interestingly, Congress has considered the more frequent, yet less concerning, scenario. *See id.*; FED. R. BANKR. P. 9037 (explaining proper procedure for redacting private information).

132. *See* Dumas & Briskin, *supra* note 129 ("Creditor claims in bankruptcy must be prepared on Form B-410 of the Official and Procedural Bankruptcy Forms [which require redaction of PHI].").

133. *Id.*

however, in which the medical provider declares Chapter 11 bankruptcy, is much more troubling than the reverse, because patients in these cases have little—if any—control over the information disclosed.[134]

A creditor need not come forward with a claim to become part of the bankruptcy case. When the debtor files its bankruptcy petition, as required by the rules, it must include schedules of each of its creditors and amounts owed, before any creditors even learn that the case has been opened.[135] In other words, a patient's information could be included in a bankruptcy document, filed with the court, and published online, before the patient becomes aware that the case has commenced.[136] When the Does' Clinic declared bankruptcy, the documents it filed with its petition might include patient names and related financial information.[137]

C. *Opportunities for HIPAA Violation in a Chapter 11 Case*

Each stage of a Chapter 11 case risks a variety of protected information.[138] Throughout the case, a debtor risks exposing patient names, addresses, phone numbers, account numbers, medical record numbers, patient ID numbers, and potentially more.[139] A walk-through of a Chapter 11 case exposes the numerous opportunities for accidental disclosure of protected information.[140] Rule 1007(a) requires the Clinic to file a creditor matrix with the court at the time of petition.[141] This matrix

134. *See infra* Part II.C.

135. FED. R. BANKR. P. 1007.

136. *Id.*

137. *See infra* Part II.C.

138. *See* Thomas R. Califano & Travis Vandell, *Avoiding HIPAA Hurdles in Healthcare Provider Chapter 11s*, TURNAROUND MGMT. ASS'N (Apr. 2018), https://perma.cc/F8VH-K8G4 ("The privacy requirements of HIPAA . . . could be implicated at several stages of a Chapter 11 case.").

139. *See id.* (describing the dangers of a provider-debtor in Chapter 11 bankruptcy cases).

140. *See id.* ("Walking through a simple timeline of a hypothetical Chapter 11 case can illustrate where these pitfalls may lie and how best to avoid them.").

141. FED. R. BANKR. P. 1007(a).

includes the entire body of real and potential creditors.[142] Current and former patients could be on this list if the provider owes them a refund for services that an insurer paid for,[143] or if they pay regular fees for routine services.[144] Fertility clinics, for example, often require out-of-pocket payments.[145] When Jane and John Doe sought treatment from their Clinic, for instance, they likely paid for their services before receiving them.[146] If they later discovered that either they overpaid, or their insurance decided to cover the treatment, the Clinic would owe the Does a refund.[147] The Does would therefore be creditors in the bankruptcy case. Thus, these privacy concerns surface in the first few days of a bankruptcy case.

Post-petition, the creditor matrix filed with the petition acts as a mailing list for subsequent filings.[148] Documents filed with the court must also be served on the matrix.[149] When the filer

142. *See* FED. R. BANKR. P. 1007(a)(1) ("[T]he debtor shall file with the petition a list containing the name and address of each entity included or to be included on schedules D, E/F, G, and H"); FORM B 106D, SCHEDULE D: CREDITORS WHO HOLD CLAIMS SECURED BY PROPERTY (INDIVIDUALS) (PDF) https://perma.cc/MT35-MGDS (requiring a list of all secured claims); FORM B 206E/F, *supra* note 59 (requiring disclosure of all unsecured creditors).

143. *See* Califano & Vandell, *supra* note 138 ("For hospitals, payments to patients for reimbursement are more common than one might think.").

144. This would be more prevalent if the debtor were a long-term care facility, which typically bills on a monthly basis and requires out-of-pocket payments. *See* U.S. Dep't of Health & Hum. Servs., *Nursing Homes and Assisted Living (Long-term Care Facilities)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/APE6-787T (last updated Feb. 22, 2019) ("Nursing homes, skilled, nursing facilities, and assisted living facilities, (collectively known as long-term care facilities, LTCFs) provide a variety of services, both medical and personal care.").

145. Monika Fika, *5 Questions to Ask When You're Considering Fertility Treatment*, AETNA, https://perma.cc/N5MR-LJP7 ("Some insurance plans cover in vitro fertilization (IVF) but not the accompanying injections that women may also require. Other plans cover both. Some plans cover limited attempts at certain treatments. And some plans do not cover IVF at all.").

146. *Id.*

147. *See* Califano & Vandell, *supra* note 138 (referencing reimbursement payments to patients as a debt owed by the provider).

148. *See id.* ("Post-petition, documents will be served on the creditor matrix . . . And for that service and subsequent *matrix mailings* . . . a corresponding affidavit of service must be filed with the court." (emphasis added)).

149. *Id.*

serves a document on the matrix, such as the notice of a 341 hearing,[150] the bar date notice,[151] or the notice of disclosure statement hearing,[152] the filer must also file a corresponding affidavit of service with the court.[153] Those affidavits typically detail which documents were served upon whom and how.[154] If a patient is a creditor, she will be included in these filings.[155] If a patient-creditor objects to the proposed plan, that objection must be filed.[156] Each filing presents a new threat to PHI. If the trustee appoints a patient-creditor to the creditors' committee, he will be required to cooperate with other creditors and the

150. *See* 11 U.S.C. § 341 (requiring a meeting of creditors and authorizing a meeting of equity security holders); FED. R. BANKR. P. 2003 (describing the date, place, and business of the meeting creditors and requiring that any examination under oath at the meeting be recorded verbatim and made available to the public for two years).

151. *See* FED. R. BANKR. P. 3003 ("The court shall fix . . . the time within which proofs of claim or interest may be filed."). The date after which most other proofs of claim are barred is known as the bar date.

152. *See* FORM B 312, ORDER AND NOTICE FOR HEARING ON DISCLOSURE STATEMENT (PDF) https://perma.cc/DDD2-HQFL (requiring notice "to the debtor, its creditors, and other parties in interest" that a Chapter 11 plan was filed and a disclosure statement hearing scheduled). A disclosure statement must provide adequate information about the debtor's financial affairs to enable a creditor or equity security holder to make an informed decision about the plan. *See* 11 U.S.C. § 1125 ("'[A]dequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records."). Acceptance or rejection of the plan usually cannot be solicited until the court approves the disclosure statement. *See id*. § 1125(b) ("An acceptance or rejection of a plan may not be solicited . . . unless . . . a written disclosure statement [is] approved, after notice and a hearing, by the court as containing adequate information.").

153. *See* Califano & Vandell, *supra* note 138 ("And for that service and subsequent matrix mailings . . . a corresponding affidavit of service must be filed with the court.").

154. *See id.* ("Undoubtedly, that affidavit will detail which documents were served upon whom and how.").

155. *See* 11 U.S.C. § 1125 ("The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class.").

156. *See* FED. R. BANKR. P. 3020 (requiring the objector to file his objection and serve it on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code, and any other entity designated by the court). As with any court filing, the document will include the name and other PPI of the filer. If the creditor objecting is a patient, this filing once again compromises their PHI.

court throughout the case.[157] Later in the case, the Clinic would need to file a schedule of assets and liabilities and its SOFAs.[158] A SOFA lists payments or transfers made within ninety days prior to the petition date.[159] These could include reimbursement payments to patients.[160] SOFAs also require a list of pending legal actions, administration proceedings, court actions, and executions within one year prior to the petition date.[161] If the provider has a pending lawsuit involving a patient, this information could expose that patient's PHI.[162]

Required schedules also create pitfalls for PHI protection, even for patients who are not creditors in the case.[163] Schedule A/B lists accounts receivable, which typically takes the form of a printout from the debtor's database of payments received up to ninety days prior to the petition date.[164] If any patient had

157. *See* 11 U.S.C. § 1103 (including attendance at hearings and meetings of creditors).

158. *See* FED. R. BANKR. P. 1007(b) ("[T]he debtor . . . shall file . . . schedules of assets and liabilities[] . . . [and] a statement of financial affairs."); 11 U.S.C. § 521 ("The debtor shall file a list of creditors[,] and unless the court orders otherwise—a schedule of assets and liabilities; a schedule of current income and current expenditures; [and] a statement of the debtor's financial affairs.").

159. *See* FORM B 207, STATEMENT OF YOUR FINANCIAL AFFAIRS (NON-INDIVIDUAL) (PDF) https://perma.cc/W695-J5RV ("List payments or transfers—including expense reimbursements—to any creditor, other than regular employee compensation, within 90 days before filing this case.").

160. *See* Califano & Vandell, *supra* note 138 ("For hospitals, payments to patients for reimbursement are more common that one might think."). This is particularly problematic because these patients are likely not creditors in the case and may not even know that the case is open. Their information is at risk, and they have no control over it. This situation will recur several times throughout a Chapter 11 case.

161. *See* FORM B 207, *supra* note 159 ("List the legal actions, proceedings, investigations, arbitrations, mediations, and audits by federal or state agencies in which the debtor was involved in any capacity—within 1 year before filing this case.").

162. *See* Califano & Vandell, *supra* note 138 ("If there is a pending lawsuit involving a patient, *which is highly likely*, the suit could be included and potentially expose the patient's PHI." (emphasis added)).

163. *See, e.g.*, FED. R. BANKR. P. 1007 (requiring a debtor to file statements of current income, which could include payments made by patients).

164. *See* FORM 206A/B, SCHEDULE A/B: ASSETS—REAL AND PERSONAL PROPERTY, PART 3 (11), https://perma.cc/Y69V-L79U (PDF) (requiring

made a payment to the Clinic in that time frame, their information would be listed.[165] Schedule A/B also requires disclosure of customer and mailing lists, which could contain additional patient information.[166] Further, Schedule E/F lists priority and unsecured claims which, like the creditor matrix, would include any patient who is also a creditor.[167] Finally, the debtor's counsel may intercept calls throughout the case from patient-creditors.[168] At the close of the Clinic's bankruptcy, its attorneys will receive their fees from the bankruptcy estate.[169] To receive such compensation, the attorney must apply to the United States Trustee, providing detailed reports of billing entries.[170] If the attorney includes the names of these creditors in his billing entries, the attorney will reveal this PHI when he files his fee applications.[171]

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disclosure of accounts receivable ninety days old or less and over ninety days old).

165. This would be the case if a patient paid for a service out-of-pocket, which is more common for smaller health care providers. *See* DIVYA SRINIVASAN SRIDHAR, DIRECT PAY: A SIMPLER WAY TO PRACTICE MEDICINE 20 (2015) ("Direct pay is a new business model to provide health care, primarily found in small practice provider's offices. . . . The rejection of traditional insurance and reimbursement mechanisms is an important characteristic of . . . direct pay, because the relationship between the patient and physician is out of pocket.").

166. *See* FORM 206A/B, *supra* note 164, at Part 10 (63) (requiring disclosure of "customer lists, mailing lists, or other compilations" as intangible and intellectual property).

167. See FORM 206E/F, *supra* note 59 ("List in alphabetical order all creditors who have unsecured claims that are entitled to priority in whole or in part.").

168. *See* Califano & Vandell, *supra* note 138 ("[D]ebtor's counsel may intercept calls throughout the case from patients who are creditors.").

169. *See* U.S. DEP'T OF JUST., UNITED STATES TRUSTEE PROGRAM FREQUENTLY ASKED QUESTIONS: FEE GUIDELINES FOR ATTORNEYS IN LARGER CHAPTER 11 CASES 1, https://perma.cc/54TR-72BV (PDF) ("Under the Bankruptcy Code, attorneys and other professionals . . . are entitled to be paid from the bankruptcy estate.").

170. *See* Appendix B Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36,248, 36,248 (June 17, 2013) (requiring detailed statements of attorneys' fee rates, fee rate changes, billing entries, employee efficiencies, and more).

171. *See* Califano & Vandell, *supra* note 138 ("The names of these patients would be included in the attorneys' billing entries, which in turn must be filed

III. PROTECTING PATIENT PRIVACY IN CHAPTER 11 CASES

A. *Practitioner's Responsibility*

Lawyers are responsible for complying with the Bankruptcy Code and are prohibited from sharing clients' private information without informed consent.[172] Relevant practice guides emphasize the importance of hiring experienced attorneys and professionals who have previously handled similar situations.[173] The absurdity of this recommendation is two-fold. First, these practice guides typically do not actually explain best practices for preventing privacy breaches.[174] Second, they presume that all the patients whose privacy is at risk in these cases can and have retained attorneys.[175] As noted in the Introduction, many health care-related bankruptcies in the United States occur in poorer, rural areas.[176] Patients are therefore not likely to be able to find or pay a HIPAA specialist for consultation in these cases.[177] Additionally, these patients

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with fee application to the court. In doing so without redacting the patient's identity, debtor's counsel could risk revealing PHI.").

172. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983); U.S. CONST. art. I, § 1 (vesting legislative powers, which manifest in the U.S. Code, in Congress).

173. *See* Califano & Vandell, *supra* note 138 ("To help with this game of juggling dynamite, it's wise to hire a team that is familiar with healthcare bankruptcies and nuances of HIPAA—from the claims agent, financial advisor, and debtor's counsel to the CRO and public relations firm.").

174. *See id.* (using vague language to discuss solutions without proffering a practical solution).

175. *See id.* ("Above all, it's best for legal teams to plan early in the case to establish protocols that avoid the disclosure of HIPAA-protected information.").

176. *See supra* INTRODUCTION; *see also* Jeremy R. Johnson & Robert Dempsey, *Polsinelli-TrBK Distress Indices: Rural Health Care Continues to Drive Industry Distress in Q2 of 2019*, POLSINELLI PUBL'NS & PRESENTATIONS (Aug. 14, 2019), https://perma.cc/8R4Z-ZWDW ("In fact, the southeast has experienced the largest volume of health care services [Chapter 11] filings this quarter, with more than half of health care services filings since the first quarter of 2019.").

177. Compared to the nearly 400,000 members of the American Bar Association, fewer than 13,000 are members of the American Health Lawyers Association. *Compare Our Members*, AHLA (2020), https://perma.cc/LC6R-

might not even know that they need privacy protection if they are not parties to the case.[178]

Yet there are several ways that counsel can protect their clients' privacy. Note that none of these solutions, save outright patient authorization, suffices alone—counsel must employ some combination of safeguards to fully comply with both the bankruptcy rules and HIPAA.[179]

1. Patient Authorization

Most obviously, the debtor can get its patients' consent to disclose PHI.[180] Because HIPAA does not consider attorneys to be covered entities, a patient's counsel cannot individually violate the privacy rule by disclosing their client's PHI.[181] Yet a provider's attorney would violate HIPAA by disclosing the patient's PHI without the patient's prior authorization.[182] Patient authorization, however, is a limited solution. For instance, only the patient himself can authorize the disclosure of his PHI,[183] but the debtor may have a reason to include that information on a filing before the patient ever even knows that the case exists.[184] Creditors are often not the first or only party

28N2 (boasting "[n]early 13,000 members strong"), *with About the ABA*, A.B.A., https://perma.cc/N2BL-BKJP (counting "nearly 400,000 members").

178. *See* FORM B 207, *supra* note 159 (collecting identifying information of any person who made a payment to the health care provider in the previous 90 days).

179. *See infra* Part III.B.

180. *See* 45 C.F.R. § 164.508(a)(1) (2019) ("When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use of disclosure must be consistent with such authorization."). This rule sets forth strict standards by which authorization may be obtained. *See id.* § 164.508(c)(1)–(4) (describing the detailed requirements that must be met for authorization to be valid); *see also supra* Part I.B (discussing legal relationships).

181. *See* 45 C.F.R. § 164.502 (2019) (defining a covered entity as a health care business).

182. *See id.* ("A covered business entity *or business associate* may not use or disclose protected health information." (emphasis added)).

183. *See id.* ("A valid authorization under this section must contain . . . [the s]ignature of the individual.").

184. *See* FED. R. BANKR. P. 1007 (requiring the debtor to provide various lists of creditors and financial statements, which may contain patient names, at the time of filing the bankruptcy petition).

to include their own information in filings.[185] In fact, a patient cannot even know if they are implicated in a bankruptcy case until the debtor lists them in the creditor matrix or another schedule.[186] In some cases, a patient's PHI can be disclosed in a bankruptcy filing even when the patient is not a party to the case.[187] It would theoretically be possible for all health care providers to require new patients to sign a PHI disclosure authorization upon intake to safeguard itself should it ever find itself in bankruptcy. Before receiving services, the patient would be required to authorize the disclosure of any PHI if the provider were ever to declare bankruptcy. The unlikeliness of patients being willing to sign such a broad release limits this solution. Imagine the distrust toward the provider such a form would invoke in a new patient. Thus, patient authorization may not always be the perfect solution.

2. Anonymization

Alternatively, practitioners may protect PHI via anonymization. Some courts have permitted attorneys to implement an anonymization scheme when creditors are patients.[188] In this system, debtors identify patient-creditors in all public filings by a number known only to the debtor and the individual creditor.[189] Thus, in the creditor matrix and subsequent schedules, the filer should identify patients by number only.[190] This scheme allows counsel to include all of the relevant information that courts require without identifying any

185. *See* FED. R. BANKR. P. 1007(a)(1) (requiring a debtor to file a list of creditors' names "with" the bankruptcy petition—thus, before the creditors are even aware that the case has been opened).

186. *See supra* Part II.C; FED. R. BANKR. P. 1007(a)(1) (requiring simultaneous filing of the bankruptcy petition and the list of creditors).

187. *See supra* Part II.C.

188. *See* Califano & Vandell, *supra* note 138 ("Courts have permitted debtors to identify the residents in all public filings, including service affidavits, by a number known only to the particular [patient] and the debtor.").

189. *See id.* (discussing anonymization).

190. *See* 45 C.F.R. § 164.514(b) (2019) ("A covered entity may determine that health information is not individually identifiable health information only if [several requirements are met].").

patients.[191] The challenge here is pragmatic in nature. Including a patient on a schedule, even without the patient's name, requires the filer to know that the patient should be included. This presupposes that the filer already has the patient's information. While the Clinic necessarily already has that information, other parties can and likely will file documents with the court.[192] A creditor on the creditors' committee, for instance, would need the information of the other members to perform the committee's duties.[193] In that case, HIPAA would already have been violated, even before the document becomes public.[194]

Similarly, this anonymization scheme requires a key to connect patients to their numbers.[195] Who maintains the key? Who has access to it? Presumably, anybody filing a document including a patient's information, or anybody required to serve their filing on a patient, would need access to the key to properly use the anonymization scheme.[196] The problem here exists in the volume and variety of documents filed in a bankruptcy case.[197] Every patient listed on any form, schedule, affidavit, or other

191. *See id.* § 164.514(a) ("Health information that does not identify an individual . . . is not individually identifiable health information.").

192. *See, e.g.*, FED. R. BANKR. P. 3001 (requiring creditors to file proofs of claim).

193. *See* 11 U.S.C. § 1102 ("A committee appointed under subsection (a) shall . . . solicit and receive comments from [other] creditors.").

194. *See* 45 C.F.R. § 164.502 (2019) ("A covered entity or business associate may not use or disclose protected health information.").

195. *See id.* § 164.514(c) ("A covered entity may assign a code or other means of record identification.").

196. *See Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, HHS.GOV, https://perma.cc/Y795-4PYB (last updated Nov. 6, 2015) [hereinafter *De-Identification Guidance*] ("Disclosure of a code or other means of record identification designated to enable coded or otherwise de-identified information to be re-identified is also considered a disclosure of PHI.").

197. *See, e.g.*, *In re* N.Y. United. Hosp. Med. Ctr., 7:04-BK-23889 (Bankr. S.D.N.Y. Dec. 17, 2004) (involving nearly eight hundred docket entries throughout the case).

filing would need to be anonymized according to the scheme.[198] Further, those numbers would need to be consistent throughout the life of the case to maintain consistency. This requires constant maintenance of a number key, which would most likely fall to the debtor-in-possession or Chapter 11 trustee.[199]

When Jane or John wish to submit a claim in their Clinic's Chapter 11 case, they or their counsel would need to know what their anonymization numbers are to remain anonymous. How do they gain access to the key without revealing themselves as patients and thus disclosing their PHI?[200] Further, if Jane Doe does gain access to the key, she then has access to the anonymization numbers of all the other patients involved in the case, thus violating those patients' HIPAA privacy protections.[201]

Finding a candidate to maintain the key complicates the problem. The judge could serve as a neutral key-holder.[202] Her physical and metaphorical distance from the case and the parties both advantages and disadvantages the case. Although placing the anonymization system in the hands of a disinterested officer promotes privacy interests, it also makes using the key practically difficult for parties who need to anonymize a document.[203] Alternatively, the United States

198. *See De-Identification Guidance*, *supra* note 196 (explaining that de-identified health information does not constitute protected health information, and therefore may be disclosed without violation).

199. *See* 11 U.S.C. § 323 (designating the trustee as the representative of the estate).

200. Although patients themselves are permitted to disclose their own PHI without restriction, *see* 45 C.F.R. § 164.502 (2013) (individuals are not "covered" entities), they might not want to. In fact, if they seek to anonymize themselves in court filings, they likely wish not to disclose their PHI. Thus, an anonymization system that requires the patient to reveal their PHI just to anonymize themselves is self-defeating.

201. Giving one patient access to the identifying information of other patients would constitute a violative disclosure of PHI by the health care provider. *See id.* (prohibiting the disclosure of PHI).

202. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

203. *See De-Identification Guidance*, *supra* note 196 ("The covered entity does not use or disclose the code or other means of record identification for any other purpose, and does not disclose the mechanism for re-identification.").

Trustee could maintain the key, although the trustee is typically just as physically unavailable as the judge.[204]

The debtor-in-possession, therefore, could likely maintain the key better than the judge or the trustee. Because the debtor in this scenario is the health care provider, it already has the patients' names and information. Maintaining the key, therefore, would not require the provider to disclose any PHI. The debtor-in-possession also participates in the case from its inception.[205] Placing it in charge of the key would therefore eliminate any delay between the petition and the anonymization.[206] It could instead establish the key before any documents are filed or published on PACER.[207]

3. Document Redaction

When certain identifying documents must be filed, counsel should redact PHI.[208] The Federal Bankruptcy Rules of Procedure allow redacted filings for documents that contain an individual's social security number, taxpayer identification number, birth date, financial account number, or the name of a minor.[209] The rules do not specifically address PHI.[210] The court

204. *See Welcome to the Jungle*, ABI J. (2003), https://perma.cc/B4DN-8AHX (describing the U.S. Trustee as active in the beginning of Chapter 11 cases but less so later on).

205. *See* 11 U.S.C. § 301 ("A voluntary case under this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.").

206. *See The Timeline for a Chapter 11 Bankruptcy Proceeding*, HIRSCHLER (Oct. 13, 2016), https://perma.cc/U4KV-KRYQ (listing the first involvement of the U.S. Trustee as three to four weeks after the petition date).

207. *See* ADMIN. OFF. OF U.S. CTS., *supra* note 105 ("These [court documents] are available immediately after they have been electronically filed.").

208. This could satisfy the de-identification requirements in 45 C.F.R. § 164.514 (2014). The rules also require the redaction of other sensitive information, such as social security numbers and financial account numbers. *Id.*

209. *See* FED. R. BANKR. P. 9037 ("[A] party or nonparty making the filing may include only: (1) the last four digits of the social-security number and taxpayer-identification number; . . . (4) the last four digits of the financial account number.").

210. *See* FED. R. BANKR. P. 9037 (addressing only social security numbers, years of birth, names of minors, and financial account numbers).

may, however, require redaction of additional information for cause.[211] The Advisory Committee Notes support this argument. The Notes specifically provide for the opportunity to redact or otherwise protect personal information not enumerated in the rule:

> While providing for the public filing of some information, such as the last four digits of an account number, the rules do not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social-security number. It may also be necessary to protect information not covered by the redaction requirement— such as driver's license numbers and alien registration numbers—in a particular case. In such cases, protection may be sought under subdivision (c) or (d). Moreover, the rule does not affect the protection available under other rules, such as Rules 16 and 26(c) of the Federal Rules of Civil Procedure, or under other sources of protective authority. Any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should therefore notify clients of this fact so that an informed decision can be made on what information is to be included in a document filed with the court.[212]

Here, again, the responsibility lies with attorneys to adequately protect patient information.[213] The problem with this rule is its limited scope. For instance, it addresses situations in which an attorney seeks to file a document

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211. *See* FED. R. BANKR. P. 9037 ("For cause, the court may by order in a case under the Code: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote access to a document filed with the court.").

212. FED. R. BANKR. P. 9037 advisory committee's note to 2007 adoption.

213. *See id.* ("The clerk is not required to review documents filed with the court for compliance with this rule. As subdivision (a) recognizes, the responsibility to redact filings rests with counsel, parties, and others who make filings with the court.").

containing her client's sensitive information.[214] It does not address situations in which the PHI at issue belongs to a non-party in the case.[215] Nor does it address situations in which the filer includes somebody else's PHI on the document.[216] When Jane's fertility Clinic files its SOFAs, reimbursement payments made to patients may be included in the filing.[217] The Clinic's counsel may discuss the public nature of the document with the Clinic before filing, but it is ultimately counsel's responsibility to know that other people's PHI is at risk and to take steps to protect it.[218] In these situations, counsel must move the court under Federal Rule of Bankruptcy Procedure 9037(d) to order redaction of any PHI contained in the filing.[219] This solution would work best as a precaution before establishing an anonymization scheme.[220] One problem with both of these solutions is that the debtor must file the bankruptcy petition before it can move the court to do anything.[221] By the time the Clinic can move the court for a protective order, it will likely have already disclosed sensitive information in the petition.[222]

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214. *See id.* ("Counsel should therefore notify clients [that filings become public record] so that an informed decision may be made on what information is to be included . . . .").

215. *See id.* (focusing solely on social security numbers and financial account numbers).

216. *Id.*

217. *See supra* Part II.C; Publication of the OIG Compliance Program Guidance for Third-Party Medical Billing Companies, 63 Fed. Reg. 243, 70,138 (Dec. 18, 1998) (requiring prompt reimbursement of overpayment due to double billing).

218. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 1983) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

219. *See* FED. R. BANKR. P. 9037(d) ("For cause, the court may by order . . . require redaction of additional information.").

220. *See infra* CONCLUSION (discussing how each of the solutions proposed in this Note work together).

221. *See* 11 U.S.C. § 301 (explaining that the case commences when the petition is filed).

222. *See* FED. R. BANKR. P. 1007 (requiring disclosure of creditors and other financial statements).

4. For Attorneys' Eyes Only

If certain information cannot be redacted, courts should mark certain documents "for attorneys' eyes only," and specify only those attorneys that absolutely must have the information.[223] If appropriately marked by court order, this solution would comply with HIPAA privacy restrictions.[224]

This is not a perfect solution either. For one, the attorneys in the case will still have access to the PHI.[225] One attorney likely does not represent every patient listed on the SOFAs, especially since most of those patients are likely not parties to the case and have no reason to seek legal counsel.[226] Therefore, in redacting a document to protect her own client's PHI, the attorney exposes herself to the PHI of countless other unrepresented patients, who may not even know that their information is at risk.[227] Even if this solution skirts the HIPAA Privacy Rule, it does not entirely protect the inherent sanctity of patient privacy.

B. *Responsibility of the Courts*

Courts possess much greater power in a bankruptcy case than attorneys or parties.[228] Title 11, § 105 of the U.S. Code, for instance, grants bankruptcy courts tremendous sua sponte

223. Although not existent in the bankruptcy rules, attorneys can, in civil cases, mark discovery and other documents as for "attorneys' eyes only." *See, e.g.*, *In re* City of New York, 607 F.3d 923, 935 (2d Cir. 2010) ("The disclosure of confidential information on an 'attorneys' eyes only' basis is a routine feature of civil litigation involving trade secrets.").

224. *See* 45 C.F.R. § 164.512 (2016) (allowing the disclosure of PHI to the extent that such disclosure is required by law).

225. *See In re City of New York*, 607 F.3d at 936 ("Even if the 'attorneys' eyes only' procedure works well in some *commercial* litigation, as well as some criminal cases, the consequences of accidental disclosure are too severe to employ the procedure here.").

226. This includes patients listed only on SOFAs, who are not creditors to the case, or patients who are unaware of the case, or patients who are simply unable to retain an attorney. *See supra* Part I.B.

227. *See supra* Part I.B.

228. *See* 11 U.S.C. § 105 (describing general powers of the court); *supra* Part I.A.1.

authority.[229] "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[230] In fact, the court may take "any action" or make "any determination necessary or appropriate to enforce or implement court orders or rules."[231] Thus, when the issue of patient privacy arrives in a bankruptcy court, the court has broad discretion to order the necessary precautions to comply with HIPAA and protect PHI.

Debtor's counsel should address concerns about patient privacy with the court upon filing the debtor's petition.[232] The court can then address, clarify, and begin resolving potential HIPAA issues at a conference or hearing with the debtor in accordance with § 105, similar to pre-trial conference procedures under Federal Rule of Civil Procedure 16(c)(2)(L).[233] A subsequent court order would then establish the expected procedures going forward and require any subsequent filer in the case to comply with the court's procedures.[234] This solution may be limited because the bankruptcy rules require motions be filed with the debtor-in-possession or the trustee, who do not join the case until after the debtor files the petition.[235]

Vesting all privacy responsibilities in the court itself could also create procedural problems. Like all judges, bankruptcy judges are involved in a case only to the extent that the parties

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229. *See id.* ("No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules.").

230. *Id.*

231. *Id.*

232. *See* FED. R. BANKR. P. 9013(d) (providing for requests for court orders).

233. *See* 11 U.S.C. § 105 (granting the bankruptcy court broad discretion to issue orders); FED. R. CIV. P. 16(c)(2)(L) ("At any pretrial conference, the court may consider and take appropriate action on . . . adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.").

234. *See, e.g.*, FED. R. CIV. P. 16 ("The scheduling order may . . . include other appropriate matters.").

235. Recall that the debtor becomes known as the debtor-in-possession upon the bankruptcy petition filing. *See* FED. R. BANKR. P. 9013 ("The moving party shall serve the motion on: (a) the trustee or debtor in possession . . . or (b) the entities the court directs.").

involve them.[236] Judges resolve disputes, respond to motions, and sign the Chapter 11 Plan Confirmation order.[237] Thus, any involvement in the protection of patient privacy by the judge would have to be initiated by a party in interest, most likely the debtor-in-possession or the trustee. And direct communication with the judge is rare.[238]

Judges are also busy.[239] In 2018, the ninety-two United States Bankruptcy Courts saw nearly 800,000 cases.[240] For this reason alone, redaction and anonymization would take much longer to accomplish under the responsibility of the judge than the parties.[241] For instance, Jane Doe could move the court to order the redaction of her PHI from all court documents, but this would require her to file a written motion (which would become public record and identify her as a patient of the Clinic) or schedule an appearance in court, and then wait for a response

236. *See How Courts Work: Courts and Legal Procedure*, AM. BAR ASS'N (Sept. 9, 2019), https://perma.cc/UZ23-P2NH ("Judges are like umpires in baseball or referees in football or basketball."); *see also* Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571, 578 (2015) ("The legislative history is full of such references to the umpire-only bankruptcy judging aspiration."); J. Ronald Trost, *Business Reorganizations Under Chapter 11 of the New Bankruptcy Code*, 34 BUS. L. 1309, 1316 (1979) ("The bankruptcy judge should not worry about 'how's the business doing?' The judge's job is to decide disputes."); H.R. REP. NO. 95-595, at 4 (1977) ("The bill removes many of the supervisory functions from the judge in the first instance . . . and involves the judge only when a dispute arises.").

237. *See* BANKRUPTCY BASICS, *supra* note 20, at 5 ("The bankruptcy judge may decide any matter connected with a bankruptcy case, such as eligibility to file or whether a debtor should receive a discharge of debts.").

238. *See id.* ("A debtor's involvement with the bankruptcy judge is usually very limited.").

239. *See FAQs: Filing a Case*, U.S. CTS., https://perma.cc/5QTL-RN96 ("Litigants should keep in mind that judges have many duties in addition to deciding cases.").

240. *U.S. Bankruptcy Courts—Judicial Business 2018*, U.S. CTS., https://perma.cc/GNL4-WNXQ ("Business petitions, which amounted to 3 percent of all petitions, fell . . . to 22,103.").

241. *See id.* ("There are numerous reasons for delay, many of which are outside of a court's control . . . [and] some courts also experience shortages in judges or available courtrooms.").

from the judge.[242] Either way, this process would take days or weeks when in the control of the court, when it instead could take only a phone call between the parties.[243]

C. *Potential Legislative Solutions*

The legislature has the ultimate authority to establish privacy protection measures.[244]

1. Incorporate PHI into F.R.B.P. 9018

Federal Rule of Bankruptcy Procedure 9018 sets out to protect secret, confidential, scandalous, or defamatory matter.[245] It does not, however, mention PHI or any type of health information.[246] Note that Congress enacted Rule 9018 in 1987 and has not amended it since.[247] HIPAA did not become

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242. *See* BANKRUPTCY BASICS, *supra* note 20 ("Much of the bankruptcy process is administrative, however, and is conducted away from the courthouse.").

243. *See id.* (explaining that the administration of a case is not carried out by the judge).

244. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid . . . exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.").

245. *See* FED. R. BANKR. P. 9018 (providing authority to the court to make an order to protect these interests).

246. *See id.* (protecting trade secrets, confidential research, development, or commercial information, scandalous or defamatory matter, and governmental matters).

247. *See id.* ("As amended Mar. 30, 1987, eff. Aug. 1, 1987."). Congress tends to avoid reforming the bankruptcy code, having done so just four times since the establishment of the United States bankruptcy system. *See* Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2017–21 (2003) (discussing the bankruptcy reform acts of 1898, 1978, 1994, and 2005). Although the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was primarily intended to be a means of curbing bankruptcy abuse by individual debtors, it contained a few provisions regarding health care businesses and consumer protection. *See* Craig A. Gargotta, *Selected New Consumer Provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, U.S. ATT'YS' BULL., July 2005, at 9 ("When Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act into law in October 2005, the focus of the legislation was to root out perceived abuses in the manner that the courts administered consumer

law until almost ten years later in 1996.[248] The legislature could expand Rule 9018 to allow courts to protect PHI.[249] This would provide a mandate for both the parties and the court to initiate protective discussions early on in the case,[250] and it would grant the court the explicit authority and responsibility to address HIPAA concerns. Such a reform would work well with an anonymization system, because the debtor could work with the court or the United States Trustee before filing documents containing PHI to establish an anonymization key and a plan for the continuing administration of the case.[251]

Such legislation could read:

> On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, (3) to protect governmental matters that are made confidential by statute or regulation, *or (4) to protect personal health information*.[252]

A definition of "personal health information" matching that in 45 C.F.R. § 160.103 should also be added to the § 101 definitions.

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cases." (citation omitted)). Notably, the health care provisions do not at all intersect with the consumer protection provisions. *Compare* 11 U.S.C. § 332 (providing for the appointment of a consumer privacy ombudsmen when a business debtor risks publishing consumer information, but not addressing risks to privacy in the context of health care businesses), *with id.* § 333 (providing for the appointment of a patient care ombudsman when a health care provider may risk maintaining a sufficient standard of care, but not addressing patient privacy).

248. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 18, 26, 29, and 42 U.S.C.).

249. FED. R. BANKR. P. 9018.

250. *See supra* Part III.B (discussing pre-trial conferences under Federal Rule of Civil Procedure 16).

251. *See supra* Part III.A.2 (proposing the establishment of an anonymization system).

252. Much of this language matches that in Federal Rule of Bankruptcy Procedure 9018.

2. Clarify F.R.B.P. 1021

Federal Rule of Bankruptcy Procedure 1021 provides for the designation of a health care business.[253] The Code defines "health care business" as a "generalized or specialized hospital, ancillary ambulatory, emergency, or surgical facility; hospice; home health agency; and other health care institution that is similar," or any long-term care facility.[254] Neither Rule 1021, the definitions section of the United States Code Title 11,[255] nor the Advisory Committee Notes explain the significance of a health care business designation.[256] The Advisory Committee Notes to Rule 1021 simply mention the definitions section and explains its relationship to Rule 1021.[257] In enacting this legislation, Congress must have considered that implications exist when a health care provider files bankruptcy.[258] Yet mention of patient privacy exists nowhere else in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

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253. *See* FED. R. BANKR. P. 1021 ("[I]f a petition in a case under chapter 7, chapter 9, or chapter 11 states that the debtor is a health care business, the case shall proceed as a case in which the debtor is a health care business.").

254. 11 U.S.C. § 101(27A).

255. *Id.* § 101.

256. *See* FED. R. BANKR. P. 1021 (describing only the designation process); 11 U.S.C. § 101(27A) (defining "health care business" and providing examples).

257. *See* FED. R. BANKR. P. 1021, advisory committee's notes to 2008 adoption ("Section 101(27A) of the Code . . . defines a health care business. This rule provides procedures for designating the debtor as a health care business.").

258. *See* Cent. Bank of Denver v. First Interstate Bank, 511 U.S. 164, 176– 77 (1994) (concluding that Congress did not impose aiding and abetting liability in the statute because "Congress knew how to impose aiding and abetting liability when it chose to do so," and did not use the words "aid" and "abet" in the statute at issue); Franklin Nat'l Bank v. New York, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances"). *But see* LARRY M. EIG, CONG. RSCH. SERV., 7-5700, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 17 (2014) (questioning the "Congress knows how to say" canon of construction).

Congress could add a consideration of patient privacy to the definitions section or Rule 1021.[259] For instance, the Rule could require additional post-petition proceedings with the debtor to determine the scope of the risk to patient privacy and to develop a plan for administering the case.[260] Even more thorough, the rule could require the implementation of a specific safeguard, such as anonymization or redaction,[261] once the risk has been assessed. For example, Congress could add a provision to the end of Rule 1021 that reads:

> Upon the designation of a debtor as a health care business under subsection (a), the debtor in possession must:
> Assess its risk of disclosing its patients' personal health information in bankruptcy filings; and submit to the court:
>
> > (1) a written assessment of the debtor's risk of disclosing personal health information; and
> > (2) a proposed plan for ensuring the non-disclosure of personal health information.[262]

This type of legislative solution would provide several benefits. For one, Congress could dictate exactly how it wants these problems to be solved.[263] If the legislature clarified its intentions for either of those provisions, practitioners and courts could adjust their behavior accordingly.[264] Additionally, a

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259. *See* FED. R. BANKR. P. 1021 (discussing only the designation of a health care business); 11 U.S.C. § 101(27A) (defining "health care business" without discussing patients or patient privacy).

260. *See supra* Part II.A (discussing pre-trial orders).

261. *See supra* Part. III.A.

262. The author used 11 U.S.C. § 333, which requires the appointment of an ombudsman upon the designation of the debtor as a health care business and if other conditions are met, as a model for this proposed legislation.

263. *See* Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 13 (1954) ("To deny that the plain meaning rule has any force or validity opens the door to violation of a fundamental objective in statutory interpretation. This position leads to a denial of legislative supremacy in the statutory field.").

264. *See id.* ("[Without a plain meaning rule,] statutes never are binding on a court as they never are clear. A court can make whatever rule it wishes and decide cases in any way it wishes, despite statutory meanings . . . ."); *see also* Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952) ("A criminal statute must be sufficiently definite to give notice of required conduct to one

federal rule dictating proper procedures in the case of potential HIPAA issues makes HIPAA compliance in bankruptcy more efficient.[265]

Currently, attorneys who find themselves in these cases often must reinvent the wheel, looking to vague practice guides or hiring expensive specialists to protect information because neither Congress nor the courts have offered a standardized solution.[266] This process costs enormous amounts of time and money, which are valuable resources for both attorneys and their debt-burdened clients.[267] It also ignores concerns for those patients that cannot hire an attorney. Amending Rule 1021 would establish a uniform and transparent procedure, thereby reducing the potential for HIPAA violations.[268] With a codified procedure for this type of situation, risks of inadvertent PHI disclosure could drop dramatically.[269]

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who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation.").

265. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 36 (Amy Gutmann ed., 1997) ("The most immediate and tangible change the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense.").

266. *See* William Baude & Ryan D. Doerler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 551 (2017) ("The relevant documents are often spread out rather than collected in a single place, and even once they are collected it can take some time and mental effort to put them in their proper context—a skill at which many lawyers and law students are not particularly good.").

267. *See id.* ("[I]f considering just the text is cheap and good enough for practical purposes, maybe it is sometimes better to move on to the next case rather than to engage in additional, expensive investigation.").

268. *See* David Gordon, *Treatment of HIPAA-Protected Information in Bankruptcy Acquisitions of Distressed Health Care Companies*, AM. BANKR. INS. (2017), https://perma.cc/3YAD-BH8X ("Health care providers operate in a highly complex and highly regulated industry. The myriad federal and state statutes and regulations applicable to health care companies can often conflict, or even collide, with the unique rules that apply to . . . bankruptcy.").

269. *See* Dumas & Briskin, *supra* note 129 ("Bankruptcy filings present another, less familiar area in which privacy rules may be inadvertently violated."); *see also* Laura N. Coordes, *Reorganizing Health Care Bankruptcy*, 61 B.C. L. REV. 419, 432 (2020) ("The [Bankruptcy] Code is insufficiently specific with respect to healthcare debtors . . . .").

3. Require the Appointment of a Privacy Ombudsman

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[270] included several provisions for situations involving health care businesses.[271] Section 351 of the Title establishes procedures by which patient records must be stored or destroyed when a health care business files under Chapters 7, 9, or 11.[272] Section 704 outlines the general duties of the United States Trustee, including the duty to transfer patients from a closing health care business to a new health care provider.[273] Although Jane Doe's Clinic intends to continue operating under Chapter 11, the principles of patient protection and the provision of appropriate and adequate care remain.[274] Public policy supports ensuring that providers meet an appropriate standard of care,[275] which may not be possible when the provider is in the process of reorganizing.[276] In these situations, Section 333 requires the court to appoint an ombudsman to monitor the quality of patient care and to represent the medical interests of the debtor's patients.[277] This

270. Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

271. *See* 11 U.S.C. § 351 (disposing of patient records); 11 U.S.C. § 333 (monitoring patient care); 11 U.S.C. § 704 (transferring patients from a closing provider to a different available provider).

272. *See id.* § 351 (requiring the U.S. Trustee to publish notice in one or more appropriate newspapers of impending document destruction and, after the prescribed period of time, shred, burn, or otherwise destroy the records).

273. *Id.* § 704(a)(12).

274. *See* 151 Cong. Rec. 2958 (2005) ("The Leahy-Hatch provision included in this legislation adds privacy protections . . . to the bankruptcy code. We wanted to prevent future cases like Toysmart.com. Once somebody tells you we are going to keep your . . . information confidential, it will be.") (statement of Sen. Leahy).

275. *See* DAN B. DOBBS ET AL., HORNBOOK ON TORTS 503–08 (2016) (presenting case law that establishes a medical standard of care).

276. *See In re* Alternate Fam. Care, 377 B.R. 754, 758 (Bankr. S.D. Fla. 2007) (establishing a nine-factor test for determining whether a patient care ombudsman would be necessary, including considerations focused on patient safety).

277. *See* 11 U.S.C. § 333 (requiring an ombudsman to maintain patient records as confidential information and conditioning review of the records on court approval and any restrictions necessary to "protect the confidentiality of such records").

must be a neutral third party appointed for the sole purpose of monitoring the provider's provision of care.[278]

Although Congress seemed to be concerned with patient privacy,[279] these health care provisions almost exclusively focus on protecting the quality of patient care rather than patient privacy.[280] Congress could enact further legislation to emphasize the protection of patient privacy and HIPAA compliance. For instance, the United States Trustee or debtor-in-possession could be legally required to appoint an ombudsman who reviews all documents that include PHI to ensure that no filings inadvertently divulge PHI.[281] This ombudsman could pre-screen all documents and demand any necessary redactions or court-ordered measures before filing.[282] This could be either the same person as required by Section 333, or it could be an entirely new individual who specializes in HIPAA compliance.[283] Appointment of this position could be triggered automatically by the designation of the debtor as a health care business under Rule 1021.[284]

This ombudsman could then maintain any anonymization or redaction policies established by the debtor and the court or

278. *See id.* ("[T]he United States trustee shall appoint 1 disinterested person (other than the United States trustee) to serve as such ombudsman.").

279. *See, e.g.*, *id.* § 351 (establishing protective measures for maintaining and appropriately destroying patient records).

280. *See, e.g.*, *id.* § 333 (establishing procedures for transferring patients to more stable facilities).

281. *See id.* § 332 (providing for the appointment of a consumer privacy ombudsman in cases involving sensitive commercial consumer information such as mailing lists).

282. *See id.* ("The consumer privacy ombudsman may . . . assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale or lease of personally identifiable information.").

283. *See Handling Customer Data in Bankruptcy Mergers and Acquisitions Coping with the Consumer Privacy Ombudsman Provisions of BAPCPA*, ABI J. (July/Aug. 2005), https://perma.cc/78QW-YJHM ("The [consumer privacy] ombudsman must be a disinterested person other than the U.S. Trustee. Hypothetically, the ombudsman could be an FTC commissioner or state attorney general.").

284. *See* 11 U.S.C. § 332 (explaining that the consumer privacy ombudsman is triggered by the use, sale, or lease of property under Section 363).

trustee at the commencement of the case.[285] She would be responsible for working with the debtor-in-possession to establish appropriate policies for administering the case in compliance with HIPAA, as authorized by an amended Rule 1021.[286] This legislation could be an addition to Section 333 or an entirely new section in the code. It could read:

> (a)(1) If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the protection of patient privacy and to represent the interests of the patients of the health care business.
> (2) If the court orders the appointment of an ombudsman under paragraph (1), the United States Trustee shall appoint 1 disinterested person (other than the United States Trustee) to serve as such ombudsman.
> (b) An ombudsman appointed under subsection (a) shall—
> (1) review the debtor's bankruptcy filings, to the extent necessary under the circumstances, to prevent the disclosure of personal health information;
> (2) establish and maintain either an anonymization plan which matches each affected patient to an anonymous identifier, or a redaction plan for identifying and redacting personal health information, or both;
> (3) monitor the debtor's compliance with the plan(s) implemented under paragraph (2); and
> (4) use the plan(s) implemented under paragraph (2) to cure any disclosures of personal health information by the debtor before documents are filed with the court.[287]

CONCLUSION

Jane and John Doe struggled with the same privacy invasion that many in the United States are likely to experience.[288] As the health care industry's financial stability

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285. *See supra* Parts III.A.2–III.A.3.

286. *See supra* Part. III.C.2.

287. *See* 11 U.S.C. § 333 (establishing patient care ombudsman appointment procedures).

288. *See* Polsinelli PC, *supra* note 6 (examining the steady decline in health care sector financial stability since 2010).

continues to decline, more and more hospitals, clinics, and primary care providers are likely to enter bankruptcy.[289] If current trends continue, demands on bankruptcy courts to protect patient privacy will only grow.[290] Currently, the legislature has under-equipped court officers with the requisite policies to handle these privacy risks.[291] Thus, when the Does' Clinic declared bankruptcy it could have inadvertently disclosed its patients' protected health information.[292] If the attorney hired to manage the Clinic's bankruptcy case did not specialize in HIPAA or even health care law generally, as most bankruptcy attorneys do not, risks of inadvertent disclosure are high.[293] To make matters worse, the patients whose sensitive information is risked often will not know the risks or be able to take action to protect their privacy.[294]

This Note proposed several potential solutions that the legislature, the courts, and bankruptcy practitioners can institute.[295] It is important to note that many of the solutions offered by this Note need not be enacted individually. Instead, most would be more effective in conjunction with each other. For instance, when Jane Doe's Clinic declared bankruptcy, it first should have either redacted PHI from the documents required by Rule 1007[296] or anonymized patient names[297] and moved the United States Trustee to discuss privacy concerns before filing any more required documents.[298] It should then have established a plan with the court or the trustee for

289. *See id.* (compiling financial distress indices using data from Chapter 11 filings).

290. *See* Zeo LaRock, *At Least 30 US Hospitals Entered Bankruptcy in 2019—and There's No End in Sight to the Financial Instability Crisis*, BLOOMBERG L. NEWS (Jan. 13, 2020, 10:05 AM), https://perma.cc/AQ8P-3N9S ("We don't anticipate that financial relief will come to hospitals in 2020 as political uncertainty is muddling their abilities to strategize and healthcare's data breach crisis will continue to constrict already-thin margins.").

291. *See supra* Part II.B.

292. *See supra* Part II.C.

293. *See supra* Part II.C.

294. *See supra* Part II.B.

295. *See supra* Part III.

296. *See supra* Part III.A.3.

297. *See supra* Part III.A.2.

298. *See supra* Part III.B.

administering the remainder of the case in compliance with the HIPAA privacy rule.[299] This plan could have included an ongoing anonymization or redaction policy,[300] the appointment of a patient privacy ombudsman,[301] or both. To establish best practices, however, the legislature must clarify its intentions regarding the conflicting provisions of HIPAA and the Bankruptcy Code.[302] Otherwise, patients like Jane and John Doe cannot be sure that their medical privacy is safe.

299. *See supra* Part III.A.4.
300. *See supra* Parts III.A.3, IV.A.2.
301. *See supra* Part III.C.3.
302. *See supra* Part III.C.